INDEX

TABLE OF CASES CITED

IN THE

Supreme Court of the United States

October Term, 1968

CLIFTON A. PEARCE,

Respondent

v.

STATE OF NORTH CAROLINA,
WARDEN R. L. TURNER,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of CLIFTON A. PEARCE v. STATE OF NORTH CAROLINA, WARDEN R. L. TURNER entered on June 19, 1968.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as CLIFTON A. PEARCE v. STATE OF NORTH CAROLINA, WARDEN R. L. TURNER, _____ F.2d _____ (4 Cir. 1968) and is printed as Appendix D to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254(1).

QUESTION PRESENTED

MAY A DEFENDANT BE SENTENCED TO A LONGER TERM OF IMPRISONMENT AT A SECOND TRIAL THAN HE RECEIVED AT HIS FIRST TRIAL AFTER THE FIRST TRIAL HAD BEEN VACATED ON THE GROUND THAT DEFENDANT'S CONFESSION HAD BEEN ERRONEOUSLY ADMITTED?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides as follows:

> Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

Clifton A. Pearce was initially tried at the May 1961 Term of the Superior Court of Durham County, North Carolina, on a charge of rape. Upon arraignment the prosecuting attorney elected to try Pearce for the offense of assault with intent to commit rape. A verdict of guilty of assault with intent to commit rape was returned by the jury. Pearce was sentenced to a term of imprisonment of not less than twelve nor more than fifteen years.

In 1965 Pearce applied for and obtained a Post Conviction review and on May 10, 1965, W. J. Johnson, Judge Presiding at the May 1965 Criminal Session of Durham Superior Court, entered an Order denying relief. The Supreme Court of North Carolina granted Certiorari to review Judge Johnson's Order and awarded Pearce a new trial "upon the ground that the trial court committed error in admitting, over defendant's objection, (his) confession . . .". This case is reported in 266 N. C. 234, 145 S.E. 2d 918 (1966).

A new Bill of Indictment charging assault with intent to commit rape was returned against Pearce by the Grand Jury at the March 1966 Session of the Durham Superior Court. Pearce was tried at the June 6, 1966 Two-Week Criminal Conflict Session, Durham Superior Court. The jury returned a verdict of guilty as charged and a prison sentence of eight years was imposed. Pearce appealed to the Supreme Court of North Carolina which affirmed the conviction. 268 N.C. 707, 151 S.E. 2d 571 (1966).

In March 1967, Pearce applied to the United States District Court for the Eastern District of North Carolina for a Writ of Habeas Corpus. In July 1967 Pearce filed a "Motion to Amend Petition for Writ of Habeas Corpus". On November 20, 1967, the District Court entered an Order voiding Pearce's second sentence under the decision of PATTON v. STATE OF NORTH CAROLINA, 381 F. 2d 636 (4 Cir. 1967), cert. den. 390 U.S. 905 (1967). The Order further directed that the State of North Carolina "proceed to re-sentence said Clifton

A. Pearce within sixty days from the date of service of this Order" and if the State of North Carolina does not elect, "this Court will entertain a motion on behalf of the petitioner for an order releasing him from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 Session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape." (See Appendix A).

On November 30, 1967, James H. Pou Bailey, a Judge of the Superior Court of North Carolina and Judge Presiding at the November 1967 Term of the Superior Court of Durham County, entered an Order electing not to re-sentence Pearce. (Appendix B).

On February 1, 1968, the United States District Court for the Eastern District of North Carolina entered a Writ of Habeas Corpus ordering Pearce's immediate release "from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 Session of the Superior Court of Durham County, North Carolina, upon his conviction of assault with intent to commit rape." (Appendix C).

The State of North Carolina and Warden R. L. Turner appealed the District Court's decision to the Fourth Circuit Court of Appeals. The Circuit Court, in a Memorandum Decision based upon PATTON v. STATE OF NORTH CAROLINA, 381 F. 2d 636 (4 Cir. 1967), affirmed the District Court's ruling and is quoted in its entirety in Appendix D. The opinion by the Fourth Circuit was filed on June 19, 1968.

REASONS FOR GRANTING THE WRIT

(1) The decision of the United States Court of Appeals for the Fourth Circuit in this case is in conflict with decisions by the North Carolina Supreme Court on the question of whether or not a defendant may be given a longer sentence at a second trial than he received at the first trial which had been set aside.

(2) The decision of the United States Court of Appeals for the Fourth Circuit in this case is in conflict with decisions rendered by other circuits on this same question.

The Fourth Circuit Court of Appeals held in this case that under no circumstances could a longer sentence be imposed at the second trial than was imposed at the first trial, and that to do so would be a violation of the due process and equal protection clauses of the Fourteenth Amendment and of the double jeopardy provision of the Fifth Amendment. This decision of the Fourth Circuit is in conflict with the decisions rendered by the Supreme Court of North Carolina in the following cases: STATE v. WHITE, 262 N.C. 52, 136 S.E. 2d 205 (1964); STATE v. ANDERSON, 262 N.C. 491, 137 S.E. 2d 823 (1964); STATE v. SLADE, 264 N.C. 70, 140 S.E. 2d 723 (1965); STATE v. WEAVER, 264 N.C. 691, 142 S.E. 2d 633 (1965); STATE v. PEARCE, 268 N.C. 707, 151 S.E. 2d 571 (1966); STATE v. PAIGE, 272 N.C. 425, 158 S.E. 2d 522 (1967).

The position of the North Carolina Supreme Court is set forth in the case of STATE v. WHITE, 262 N.C. 52, 136 S.E. 2d 205 (1964). The Court, in that decision, noted: "The defendant at his request was granted a new trial of his case tried at the May 1961 Criminal Term in which he was found guilty as charged in the indictment, which under our decisions results in a retrial of the whole case, verdict, judgment, and sentence. (Citations omitted)." The North Carolina Supreme Court then went on to determine: "There is nothing in the record to suggest that (the trial judge) imposed upon defendant, a heavier sentence than he received at the first trial merely because he obtained a new trial. When defendant, at his request, obtained a new trial, hoping to be set free or obtain a lighter sentence, he accepted the hazard of receiving a heavier sentence, if convicted at the new trial of the same identical offense, and this is not a denial to him of any constitutional right as contended by him."

In STATE v. PAIGE, supra, the North Carolina Supreme Court again held that a longer sentence could be imposed

at a retrial than had been imposed at the first trial. This opinion was handed down after the Circuit Court's opinion in PATTON v. NORTH CAROLINA was decided.

The Maryland Court of Special Appeals has already declined to follow the Fourth Circuit Court of Appeals decision in the Patton case in two very recent decisions, MOON v. STATE, 232 A. 2d 277 (1967), and REEVES V. STATE, 238 A. 2d 307 (1968), stating that it adhered to the former Maryland decisions on this question. The State of Maryland is within the jurisdiction of the Fourth Circuit Court of Appeals.

The various circuits are also in disagreement as to whether or not a longer sentence may be imposed at the second trial.

In MARANO v. UNITED STATES, 374 F. 2d 583 (1st Cir. 1967), defendant Marano had received a sentence of three years at his first trial after being convicted in the U. S. District Court of receiving stolen goods transported in interstate commerce. Upon appeal, his conviction was set aside and a new trial granted. At his second trial he was again convicted of the same offense and received a five year sentence. The same judge who had presided at Marano's first trial also presided at his second trial. The Court, in imposing the five year sentence, expressly disclaimed that it was penalizing the defendant, and gave two reasons for increasing the sentence: "Mr. Marano's sentence was based on evaluation of the presentence report and the additional testimony which came out at the trial."

It was held by the First Circuit Court of Appeals in MARANO that a sentence may not be increased following a successful appeal, even where additional evidence has been introduced at the second trial. It recognized an exception with respect to presentence reports, stating that "we do not think it inappropriate for the court to take subsequent events into consideration, both good and bad." 374 F. 2d at 585. The Court in that case also stated that if a sentence was increased following retrial the "grounds for doing so should be made affirmatively to appear." Id. at 585-86, N. 3.

In determining that defendant Marano's second sentence of five years was improper, the First Circuit stated: "As we have recently held, a defendant's right of appeal must be unfettered. WORCHESTER v. COMMISSIONER OF INTERNAL REVENUE, 1 Cir. 1966, 370 F. 2d 713. So far as sentence is concerned, this principle cannot be restricted to those situations in which a defendant, in deciding whether to appeal, must contemplate the certainty of an increased sentence if he obtains a new trial and is convicted again. Not only must he not be faced with such a certainty, WORCHESTER v. INTERNAL REVENUE, supra, he likewise should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a direct penalty for so doing." 374 F. 2d 585. The First Circuit cited the District Court opinion in the PATTON Case in support of this statement.

In STARNER v. RUSSELL, 378 F. 2d 808 (3rd Cir.) cert. denied, 389 U.S. 889 (1967), the Third Circuit Court of Appeals stated the question to be determined in that case as follows: "The sole issue in this case is the right of a State Court to increase punishment following a new trial where the first sentence imposed on the prisoner's plea of guilty is less and vacated on the prisoner's contention that he was denied counsel as required by GIDEON v. WAINWRIGHT, 372 U.S. 335, 83 S. Ct. 792, L. Ed. 2d 799." 378 F. 2d at 810.

In this case, the United States District Court had held the second sentence to be unconstitutional because of the insufficiency of the sentencing court's reasons for imposing a greater sentence on the basis of the opinion in the case of PATTON v. STATE OF NORTH CAROLINA, 256 F. Supp. 225 (W.D.N.C. 1966). The Third Circuit Court of Appeals held this to be error.

In STARNER the Third Circuit Court of Appeals specifically disagreed with that portion of the opinion of the First Circuit Court of Appeals in MARANO v. UNITED STATES which is quoted above and in support of which the District Court case of PATTON v. NORTH CAROLINA was

cited. The Third Circuit stated, at page 811: "We differ with the Court's opinion for the reason that we cannot properly speculate that the court certainly will increase the sentence, after a new trial. To so hold would seem to trespass the integrity of the trial judge who, upon hearing all of the evidence, with the whole panorama of defendant's crime laid out before him, conscientiously passes sentence in accordance therewith, even though here the defendant did not take the stand nor call witnesses on his behalf. The sentence thus imposed by the trial judge cannot, in any sense, be said to be for his appealing, unless we again attribute to him a base motive—penalizing him for his appeal, conduct unworthy of the name of judge—rather than for his weighing and evaluating the measure of defendant's crime and passing sentence thereon, in the light of the wider, factual area incompassed by the trial which, in most instances, is far more revealing than those factual elements taken into consideration in the imposition of sentence upon a plea of guilty . . . When he appeared and entered a plea of not guilty at the second trial, the slate had been wiped clean and it was an entirely new case and bore no relationship whatsoever to his previous plea of guilty which he had entered."

Another reason given by the Third Circuit Court of Appeals in upholding the longer sentence given at the second trial in the STARNER Case would also apply to Patton's situation, upon which Pearce is bottomed. At his first trial, Patton entered a plea of nolo contendere. At his second trial, Patton entered a plea of not guilty and was found by a jury to be guilty as charged: Starner had entered a plea of guilty at his first trial, and at his second trial had entered a plea of not guilty and was found by a jury to be guilty as charged. The Third Circuit stated at 378 F. 2d 811: "Furthermore, there is much to be said for the Commonwealth's position that on a plea of guilty the defendant has already entered on the rehabilitative process, that he is purging himself thereby on his wrong doing, and it must be conceded that a sense of contrition therefore must have motivated his conduct and, accordingly, consideration might well be given therefor. However, when he elects to have his case retried before a jury, he takes a chance after conviction on the trial judge's

discretion in sentencing him. In ROBINSON v. JOHNSTON, D. C., 50 F. Supp. 744 one Robinson, a prisoner at Alcatraz, filed a petition for habeas corpus in 1939, alleging that he had not been represented by legal counsel and was sentenced under the Lindbergh Act for the crime of kidnapping. A new trial was granted, counsel obtained for him, the jury convicted him and the court sentenced him to death. The sentence was affirmed by the Circuit Court of Appeals, ROBINSON v. UNITED STATES, 144 F. 2d 392, 393, and by the Supreme Court of the United States at 324 U. S. 282, 65 S. Ct. 666, L. Ed. 629. Undoubtedly, it would therefore seem to be the rule in the Federal system that a trial judge, when a new trial is ordered, may impose a sentence greater than one he had earlier vacated, and that it is unnecessary to articulate the reason for any differentiation in the term of the sentence."

In UNITED STATES v. WHITE, 382 F. 2d 445 (7th Cir. 1967), the Seventh Circuit Court of Appeals specifically declined to follow the Fourth Circuit Court of Appeals decision in PATTON v. NORTH CAROLINA, 381 F. 2d 636, (4th Cir. 1967) and the First Circuit Court of Appeals decision in MARANO v. UNITED STATES, 374 F. 2d 583 (1st Cir. 1967). In determining that the imposition of a longer sentence at the second trial than was imposed at the first trial did not violate the due process clause of the Fourteenth Amendment nor the double jeopardy provision of the Fifth Amendment, the Seventh Circuit stated that "we approved of the statement of the Third Circuit in UNITED STATES EX REL. STARNER v. RUSSELL, No. 16392, (3rd Cir., May 25, 1967), that a trial judge, 'when a new trial is ordered, may impose a sentence greater than one he had earlier vacated, and . . . it is unnecessary to articulate the reason for any differentiation in the term of the sentence.' " 382 F. 2d at 449-50.

As to the argument that imposing a longer sentence at the second trial than was imposed at the first trial violated the double jeopardy provisions of the Fifth Amendment, the Seventh Circuit Court of Appeals stated: "Similarly as to the defendant's double jeopardy argument, we do not believe that

the Fifth Amendment prohibits different punishments upon reconviction for the same crime following a successful appeal when the punishment, whether imposed by the same or a different district judge, results from the judge's exercise of his traditional discretionary function of considering a variety of sentencing factors, many of which have no direct relationship to the crime itself.

"We are fully aware of the recent decisions of other courts, dealing with these and related questions, which have expressed views contrary in many respects to those expressed herein. We think, however, that the pronouncement of a constitutional principle as sweeping and inflexible as that discussed in certain of these decisions and urged here by the defendant should await the considered judgment of the Supreme Court, particularly as that Court may choose to refine or abandon whatever distinctions remain between GREEN v. UNITED STATES, 355 U. S. 184 (1957), and STROUD v. UNITED STATES, 251 U. S. 15 (1919)." 382 F. 2d 448.

Therefore, it is respectfully submitted that this Court should exercise its jurisdiction in granting the writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case so that the conflict in the decisions rendered by the Fourth Circuit Court of Appeals and the decisions rendered by the Supreme Court of the State of North Carolina, and the conflict in the decisions from the various Circuit Courts of Appeal, on the question presented here, may be settled.

Respectfully submitted,

THOMAS WADE BRUTON,
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COUNSEL FOR PETITIONERS

Appendix A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
NO. 1973 CIVIL

CLIFTON A. PEARCE	:	
	:	
V.	:	ORDER
	:	
STATE OF NORTH CAROLINA, WARDEN R. L. TURNER	:	

THIS CAUSE coming on to be heard upon the application of Clifton A. Pearce, a state prisoner, for a writ of habeas corpus, the court finds the following facts:

That the petitioner was convicted by a jury at the May, 1961 term of the Superior Court of Durham County, of assault with intent to commit rape and was given a sentence of 12 to 15 years; that the petitioner sought post-conviction relief and was awarded a new trial by the Supreme Court of North Carolina[1] because of the use of an involuntary confession at his original trial; that petitioner was retried at the June, 1966 term of the Superior Court of Durham County, and convicted by a jury of assault with intent to commit rape; that in sentencing petitioner at the new trial, the trial judge stated that it was his intention to give the petitioner a sentence of fifteen years, but he was taking into consideration the time already served, and therefore sentenced him to eight years; that the petitioner appealed his conviction to the North Carolina Supreme Court[2] which affirmed his conviction; that the petitioner sought a post-conviction hearing in February of 1967 which was denied.

Petitioner alleges, *inter alia*; that he received a harsher sentence at his retrial and therefore the second sentence is void under the decision of Patton v. State of North Carolina.[3] With this contention we must agree. The eight year sentence

petitioner received at his second trial gives him more than full credit for time served on the maximum length of the original sentence, but it does not give full credit on the minimum length of the original sentence.[4] Now therefore, based upon the present record before this court, it is ORDERED AND ADJUDGED:

(1) That the sentence imposed on Clifton A. Pearce at the June 1966 session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape is unconstitutional and void.

(2) That the State of North Carolina file in the office of the Clerk of this court in the Federal Building, Raleigh, North Carolina, within ten days after service of this order, a statement certifying whether or not said State elects to resentence the petitioner, Clifton A. Pearce.

(3) That the State of North Carolina proceed to resentence said Clifton A. Pearce within sixty days from the date of service of this order if said State should elect to resentence him.

(4) That if the State of North Carolina does not elect to resentence said petitioner, or if said State should elect to resentence him and fail to do so within the sixty (60) days prescribed, this court will entertain a motion on behalf of the petitioner for an order releasing him from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape.

(5) That the United States Marshal serve forthwith a copy of this order upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina; and the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina; that the Clerk shall serve a copy of this order by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, and the petitioner, Clifton A. Pearce.

This November 17, 1967.

/s/ Algernon L. Butler
Chief Judge, U. S. District Court

A True Copy, Teste:
Samuel A. Howard, Clerk

By Norma G. Blackman
Deputy Clerk

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[1] State of North Carolina v. Clifton A. Pearce, 266 N.C. 234, 145 S.E. 2d 918.

[2] State of North Carolina v. Clifton A. Pearce, 268 N.C. 707, 151 S.E. 2d 571.

[3] Patton v. State of North Carolina, 381 F. 2d 636 (1967).

[4] Patton v. Ross, 267 F. Supp. 387 (E.D.N.C. 1967), Hall v. Stallings, Civ. No. 1811, Raleigh Division (E.D.N.C. 1967).

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 1967, I served a copy of the foregoing order upon the Honorable T. Wade Bruton; Attorney General of North Carolina, Raleigh, North Carolina, and a copy upon the petitioner, Clifton A. Pearce, North Carolina Central Prison, 835 West Morgan Street, Raleigh, North Carolina, by depositing the same in the United States mail, postage prepaid, in envelopes addressed respectfully to each at their respective addresses.

SAMUEL A. HOWARD, Clerk
United States District Court

By Norma G. Blackman
Deputy Clerk

Appendix B

NORTH CAROLINA DURHAM COUNTY		IN THE SUPERIOR COURT
STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
CLIFTON A. PEARCE	)	

This cause comes on to be heard pursuant to an Order dated the 17th of November, 1967 filed the 20th of November, 1967 in the United States District Court, Eastern District of North Carolina, and signed by the Honorable Algernon L. Butler, Chief Judge, United States District Court, Eastern District of North Carolina. The said Order provides as follows:

(1) That the sentence imposed on Clifton A. Pearce at the June 1966 Session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape is unconstitutional and void.

(2) That the State of North Carolina file in the office of the Clerk of this Court in the Federal Building, Raleigh, North Carolina, within ten days after service of this Order a statement certifying whether or not said State elects to resentence the petitioner, Clifton A. Pearce.

(3) That the State of North Carolina proceed to resentence said Clifton A. Pearce within sixty days from the date of service of this Order if said State should elect to resentence him.

(4) That if the State of North Carolina does not elect to resentence said petitioner, or if said State should elect to resentence him and fail to do so within the sixty (60) days prescribed, this Court will entertain a motion on behalf of the petitioner for an order releasing him from

all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 Session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape.

(5) That the United States Marshal serve forthwith a copy of this Order upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina; and the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina; that the Clerk shall serve a copy of this Order by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, and the petitioner, Clifton A. Pearce.

An examination of the records relating to this case discloses the following:

That the defendant Pearce was indicted by the Grand Jury upon the capital charge of rape of a 12-year-old girl. He was tried by a jury at the May 1961 Session of the Superior Court of Durham County and was convicted of assault with intent to commit rape and was sentenced to twelve to fifteen years in the State's prison. Upon the same day he was transferred to Central Prison in Raleigh. That thereafter the petitioner sought post-conviction relief and was awarded a new trial by the Supreme Court of North Carolina, 266 N.C. 234; 145 S.E. 2d 918. That thereafter the petitioner was retried upon a new bill of indictment charging the petitioner with the crime of assault with intent to commit rape, the said bill of indictment having been returned at the March 1966 Session of Superior Court of Durham County. He was again convicted by a jury. At this second trial in passing sentence upon the defendant Pearce, the Trial Judge entered this judgment: "It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however, it appears to the Court from the record available from the Prison Department that the defendant has served six years, six months, and seventeen days, flat and gain time combined, and the Court

in passing sentence in this case is taking into consideration the time already served by the defendant. It is the judgment of this Court that the defendant be confined in the State's prison for a period of eight years." That this conviction was appealed to the North Carolina Supreme Court. One of the questions raised on his appeal was his contention that the sentence given him at the second trial was in excess of that given him at his first trial. The Supreme Court of North Carolina affirmed his conviction. (268 N.C. 707; 151 S.E. 2d 571). Thereafter the petitioner sought by post-conviction hearing a new trial, which was denied.

The maximum punishment for the felony of assault with intent to commit rape in North Carolina is fifteen years.

The Court concludes the facts and the law in this case to be as follows:

The sentence at the second trial has been held by the Supreme Court of North Carolina to be properly and lawfully imposed under the law.

In this case the Federal District Court on a writ of habeas Corpus appears to assert that it will directly overrule the highest appellate court in the State of North Carolina on a specific question presented to and passed upon by the Supreme Court of North Carolina.

The Superior Court of North Carolina is the only Court in the State with the authority to sentence a person convicted for the felony of assault with intent to commit rape.

In this case the Federal District Court on a writ of habeas corpus is attempting by its Order to require the Superior Court of North Carolina to overrule the Supreme Court of North Carolina, and the Superior Court of North Carolina does not have such authority or power.

The writ of habeas corpus may not be used as a substitute for an appeal or writ of error.

Except for the original jurisdiction of the United States Supreme Court which flows directly from the Constitution, two prerequisites to jurisdiction must be present in the Federal Courts. First, the Constitution must have given the Courts the capacity to receive it; and second, an act of Congress must have conferred it.

There is no act of Congress conferring upon a Federal District Court the authority, the power, or the jurisdiction to require the Superior Court of the State of North Carolina to act in this matter.

There is no act of Congress conferring upon a Federal District Court the authority, the power, or the jurisdiction to direct the Superior Court of the State of North Carolina to act in opposition to a ruling of the Supreme Court of North Carolina.

This Court will not take or attempt to take action in direct contravention of the ruling of the Supreme Court of North Carolina.

The grounds upon which the Federal District Court is so ruling or asserting that it will act is that a greater sentence was imposed upon a second trial. The Supreme Court of the United States has not ruled that this is unconstitutional. At least two of the United States Circuit Courts of Appeals have ruled in the following language: "A trial judge, when a new trial is ordered, may impose a sentence greater than one he had earlier vacated, and it is unnecessary to articulate the reason for any differentiation in the term of the sentence."

The Order of the Federal District Court concedes that the petitioner is properly subject to imprisonment for his crime, and the Order of the Federal District Court (which is threatened in the present Order to be issued in sixty (60) days) which might result in the immediate release of the prisoner will be entirely contrary to law and contrary to the proper administration of justice.

A copy of this Order is directed to be mailed to the following: Honorable V. Lee Bounds, Director, North Carolina Department of Correction; Honorable T. Wade Bruton, Attorney General of North Carolina; and Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District.

This the 30th day of November, 1967.

James H. Pou Bailey
Judge Presiding

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
No. 1973 — Civil

Clifton A. Pearce	:	
	:	
v.	:	Writ of Habeas Corpus
	:	
State of North Carolina, Warden R. L. Turner	:	

This cause coming on to be heard upon motion of Clifton A. Pearce for an order releasing him from restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape, and it appearing that an order was entered by this court on November 20, 1967, adjudging the said sentence imposed at the June 1966 session of the Superior Court of Durham County to be unconstitutional and void, and allowing the State of North Carolina sixty (60) days within which to impose a constitutional sentence, and providing further that if the State should fail to resentence the petitioner within the sixty (60) days prescribed, this court would entertain a motion on behalf of the petitioner for an order releasing him from all restraint imposed by virtue of said sentence; and it further appearing to the court that on November 30, 1967, the Superior Court of Durham County entered an order electing not to resentence the petitioner in accordance with the option granted by this court, and that said period of sixty (60) days has expired; that the court is of the opinion that the State of North Carolina has been afforded a reasonable opportunity within the sixty (60) days prescribed to resentence petitioner to a maximum term of imprisonment of not less than 12 nor more than 15 years in the State's prison, subject to credit for the time served on the prior invalidated sentence; that if the State had elected to resentence and to impose the maximum constitutional sentence,

after allowance of the required credit, there would still remain approximately six years of petitioner's sentence yet to be served; that this court is reluctant to release petitioner until he has fully paid his debt to society, but it is left with no alternative; that the petitioner's present sentence has been adjudged unconstitutional and void, and the State has refused to impose a constitutional and valid sentence; Now, therefore,

It is ORDERED AND ADJUDGED as follows:

(1) That the respondents release immediately Clifton A. Pearce from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 session of the Superior Court of Durham County, North Carolina, upon his conviction of assault with intent to commit rape.

(2) That the United States Marshal serve forthwith a copy of this order upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina, the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina; that the Clerk shall serve a copy of this order by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh, North Carolina, the petitioner, Clifton A. Pearce, and the respondent, R. L. Turner, Warden of Central Prison.

(3) That the effectiveness of this writ is stayed for a period of thirty (30) days from the date of service hereof to permit the respondents to appeal if they be so advised.

This 1st day of February, 1968.

Algernon L. Butler
Chief Judge, United States District Court

A True Copy, Teste:
Samuel A. Howard, Clerk

By Joyce W. Todd
Deputy Clerk

CERTIFICATE OF SERVICE

I have this date ....., 1968, served a certified copy of the above writ upon the Honorable Dan K. Edwards, Solicitor of the Tenth Solicitorial District of North Carolina, Durham, North Carolina, and the Honorable V. Lee Bounds, Director of the North Carolina Department of Correction, Raleigh, North Carolina.

.....

United States Marshal

I have this date February 2, 1968, served a copy by mail upon the Honorable T. Wade Bruton, Attorney General of North Carolina, Raleigh North Carolina, the petitioner, Clifton A. Pearce, and the respondent, R. L. Turner, Warden of Central Prison, Raleigh, North Carolina.

Samuel A. Howard, Clerk

Joyce W. Todd
Deputy Clerk, U. S. District Court

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 12,256.

Clifton A. Pearce,
Appellee,

versus

State of North Carolina and Warden R. L. Turner,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH. ALGERNON L. BUTLER, CHIEF JUDGE.

(Submitted June 10, 1968. Decided June 19, 1968.)

Before HAYNSWORTH, Chief Judge, and BRYAN and WINTER, Circuit Judges.

T. W. Bruton, Attorney General of North Carolina, Andrew A. Vanore, Jr., and Dale Shepherd, Staff Attorneys, Office of the Attorney General of North Carolina, on brief for Appellants, and Larry B. Sitton (Court-assigned counsel) and Smith, Moore, Smith, Schell & Hunter on brief for Appellee.

PER CURIAM:

The district court issued a writ of habeas corpus and ordered the release of petitioner for the reason that he had served the maximum term imposed on him at his original trial notwithstanding that on retrial, after successful post-conviction attack, he was sentenced to a longer term. The action was taken on the authority of our decision in *Patton* v. *North Carolina,* 381 F.2d 636 (4 Cir. 1967), *cert. den., North Carolina* v. *Patton,* 390 U.S. 905 (1968).

In this appeal, the State of North Carolina frankly asks us to reconsider our decision in *Patton* in the light of cases considered therein which reached a contrary conclusion and subsequent decisions which have failed to follow it. This we decline to do; and because the issue on appeal is so narrow, we concluded to dispense with oral argument.

On the authority of *Patton,* the order of the district court is

Affirmed.